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NCLT Brief

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Corporate Brief:

➲ MCA notifies Companies (Incorporation) Fifth Amendment Rules, 2021

Vide Gazette Notification dated 22.07.2021, Ministry of Corporate Affairs (MCA) introduced the Companies (Incorporation) Fifth Amendment Rules, 2021 ["**Incorporation Amendment Rules**"] to make the following amendment to the Companies (Incorporation) Rules, 2014 ["**Incorporation Rules**"] which shall be in effect from 01.09.2021**:**

- ***Insertion of New Rule 33A:***

(i) Rule 33A has been inserted to regulate the allotment of 'new name' to those companies who fail to comply with the direction issued by the Central Government under Section 16 (*Rectification of Name of Company*) of the Companies Act, 2013 ("**Act**") within a period 3 (three) months from the date of the said direction, with respect to change of name at the time of registration.

(ii) For such a company, the 'new name' shall be issued with (a) letters ORDNC ('*Order of Regional Director Not Complied*'); (b) year of passing of direction; (c) serial number and; (iv) the existing Corporate Identity Number (CIN) of the company shall become the new name of the company without any further act or deed.

(iii) Further, the Registrar of Companies (ROC) shall record such 'new name' of the company in the register of companies and shall thereof, issue a fresh certificate of incorporation under Form No. INC-11C to such defaulter company.

➲ SEBI issues Circular on Relaxation in timelines for compliance with regulatory requirements by Debenture Trustees due to Covid-19

Vide Circular No. SEBI.HO.MIRSD/CRADT/CIR/P/2021/597 dated 20.07.2021, Securities Exchange Board of India ("**SEBI**") had provided further relaxations to the Debentures Trustees ("**Trustees**") by extending timelines for submissions of documents and statements required under the regulatory regime. The relaxations had been introduced by SEBI in consideration with the difficulties expressed by the Trustees in ensuring compliance under the relevant SEBI regulations due to the restrictions on movement and lockdown imposed by state government authorities amidst the COVID-19 outbreak.

Following timelines have been relaxed for the Trustees in respect of their compliance under vide SEBI circular dated November 12, 2020 ("**2020 Circular**"):

- Timelines extended from July 15, 2021 to August 31, 2021, for following compliance:
  (i) Submission of Asset Cover Certificate;
  (ii) Submission of Statement of value of pledged securities; and
  (iii) Submission of Statement of value for Debt Service Reserve Account (DSRA) or any other form of security offered
  (iv) Following disclosures on the website as per Clause 4 of the 2020 Circular:
    (a) Monitoring of asset cover certificate and quarterly compliance report of the listed entity;
    (b) Monitoring of utilization certificate;
    (c) Status of information regarding breach of covenants/ terms of the issue, if any action taken by Trustees; and
    (d) Status regarding maintenance of accounts maintained under supervision of Trustees.

- Timelines extended from July 15, 2021 to October 31, 2021, for the following compliances:

  (i) Submission of Net worth certificate of guarantor (*secured by way of personal guarantee*);
  (ii) Submission of financials/ value of guarantor prepared on basis of audited financial statement etc. of the guarantor (*secured by way of corporate guarantee*);
  (iii) Submission of valuation report and title search report for the immovable/movable assets, as applicable.

➲ RBI issues a Circular on Addition of Retail and Wholesale Trade in the Definition of Micro, Small and Medium Enterprises

Reserve Bank of India ("RBI") vide Circular No. FIDD.MSME & NFS.BC.No.13/06.02.31/2021-22 dated 07.07.2021:

The Ministry of Micro, Small and Medium Enterprises has included the following retail and wholesale trade as MSMEs only for the purpose of Priority Sector Lending and are permitted to be registered on Udyam Registration Portal, against the mentioned NIC codes:

- 45 - Wholesale and retail trade and repair of motor vehicles and motorcycles;
- 46 – Wholesale trade except of motor vehicles and motorcycles;
- 47 – Retail trade except of motor vehicles and motorcycles.

➲ RBI Circular on Loans and Advances-Regulatory Restrictions

Reserve Bank of India ("RBI") vide Circular No. DOR.CRE.REC.No.33/13.03.00/2021-22 dated 23.07.2021:

Vide Circular No. RBI/2021-22/72 DOR.CRE.REC.No.33/13.03.00/2021-22, RBI amended the Master Circular on Loans and Advances – Statutory and other Restrictions dated 01.07.2015. Following amendments have been introduced:

- Threshold for personal loans granted to any directors of other banks has been revised from INR. 25,00,000 (Indian Rupees Twenty-Five Lakhs only) to INR. 5,00,00,000 (Indian Rupees Five Crore only)
- Bar has been imposed on granting loans and advances above INR. 5,00,00,000 (Indian Rupees Five Crore only) to the following persons, unless sanctioned by the Board of Directors/ Management Committee of the banking company:

  (i) Any relative other than spouse and minor/ dependent children of their own the Chairman/ Managing Directors or other Directors. Provided that the bank may grant loan or advances to or on behalf of spouses of their Directors in case where the spouse as his/her own independent source of income arising out of his/her employment or profession and the facility of loan or advance so granted is in accordance with standards procedures and norms in relation to creditworthiness of the borrower;
  (ii) Any relative other than spouse (above proviso to apply in respect of spouse) and minor/ dependent children of the Chairman/ Managing Directors or other Directors of other banks (*including directors of Scheduled Co-operative Banks, directors of subsidiaries/trustees of mutual funds/venture capital funds*);
  (iii) Firm in which relatives other than spouse (*above proviso to apply in respect of spouse*) and minor/ dependent children as mentioned in (i) & (ii) above, have an interest as a partner or guarantor; and
  (iv) Any company in which relatives other than spouse (*above proviso to apply in respect of spouse*) and minor/ dependent children as mentioned in (i) & (ii) above, has an interest as a major shareholder (*meaning a person holding 10% (ten percent) or more of the paid-up share capital or INR. 5,00,00,000 (Indian Rupees Five Crore only) in paid-up shares whichever is less*) or as a director or as a guarantor or is in control (*meaning shall include right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or person acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in another manner*).

Real Estate Brief:

➲ Vide notification No. "K-RERA/T3/102/2020" dated 19.07.2021, of Real Estate Regulatory Authority, Kerala ('**Authority**'):

Due to the adverse effects of second wave of COVID 19 pandemic and consequent lockdown declared in the state, K-RERA vide its notification date 19.07.2021 informed:

The Promoters of the real estate projects who are in need of an extension to the date of completion of any of their project and whose date of completion and expiry of registration certificate expires on or after 01.04.2021, shall apply in Form E annexed to Kerala Real Estate (Regulation and Development) Rules, 2018 for which the Authority shall give the extension for the period

sought by the Promoters (only up to a maximum of 6 months) in Form F without charging any fee.

- Vide notification No. "K-RERA/T3/102/2020" dated 22.07.2021, of Real Estate Regulatory Authority, Kerala (**'Authority'**):
  - The Authority gave final warning to all Promoters to strictly adhere to the instructions issued under Order of 'K-RERA No: K-RERA/t3/102/2020, dated: 08-09-2020' and Order of K-RERA No: K-RERA/T3/102/2020, dated: 18-11-2020 in respect of display of registration number and website address in all advertisements and prospectus under Section 11(2) of the Real Estate (Regulation and Development Act, 2016 read with Regulation 5(6) of Kerala Real Estate Regulatory Authority (General) Regulation, 2020.
  - It also warned all the Promoters that if the registration number is not displayed by promoters as instructed, it will amount to contravention of Section 11(2) of the Act and such defaulters shall be liable to a penalty which may extend up to 5% of the estimated cost of the project.
- Vide circular No. "MahaRERA/Secy/File No.27/140/2021" dated 22.07.2021, of Maharashtra Real Estate Regulatory Authority (**'Authority'**):

With respect to Format – B: Resolution / Consent for Extension and Format – C: Resolution / Consent for Correction U/S 14(2), in case the table providing allottee details and signatures does not fit in single page due to large number of allottees, then the table can be spread across multiple pages. In such case, every page should contain the MahaRERA Project Registration number, resolution to which allottees are agreeing to and cumulative table.

Further, approval of allottees can also be received over email/individual Letter. In such case, the copy of email / Individual Letter should be annexed with the application.

- Vide circular No. "MahaRERA/Secy/ File No. 27/1411/2021" dated 23.07.2021, of Maharashtra Real Estate Regulatory Authority (**'Authority'**):

Vide the circular dated 23.07.2021 ("**Circular**"), it was decided to revise the procedure relating to the transfer of promoter's rights and liabilities to third party:

- **Transfer initiated by the promoter:**
  - the promoter shall apply for permission to the Authority for transferring or assigning it's rights and liabilities to third party along with the consent of two-third allottees as on the date of application in the project under consideration. The intending purchaser shall submit the documents mentioned in Annexure B and C of the Circular. The promoter shall also intimate the Secretary of the Authority as prescribed in Annexure 1. On receipt of such application, Secretary shall initiate action through the legal wing, to take necessary steps to obtain approval of the Authority, including to schedule a hearing. The Authority shall thereafter pass an order within 1 (one) month of filing of the application, either granting approval or rejecting such application for transfer.
  - The new promoter shall, within 7 (seven) days of completion of transfer, apply for necessary corrections in the existing details, on receipt of approval from Authority. The promoter shall upload a registered undertaking stating compliance with all obligations under agreement to sale executed by the previous promoter with the Allottees.
  - Promoter shall have to follow the procedure prescribed above for obtaining the approval of the allottees, if an amalgamation or merger of the companies, in which amalgamating company has one or more of the projects registered under RERA, is voluntarily initiated by the promoter, after 30th April, 2017. However, if the amalgamation or merger or demerger of the companies, not regarded as transfer under Section 47 of the Income Tax Act, 1961 or where 75% of the shareholders remain same in the resultant company, the same shall not be required to follow the above mentioned process.
- **Transfer initiated by a third party**
  - In situations where the transfer is initiated by third parties like financial institution/ creditors, etc. by operation of law or by way of enforcing of the security, then the promoter shall intimate the Secretary within 7 (seven) days of being aware of the impending/ potential transfer arising out of enforcement of security or mortgage, provided the Secured Loan and/or the charge on the project is disclosed in the registration details of the project on the website of the Authority.
  - The promoter shall simultaneously inform each and every allottee of the project of the impeding or potential transfer. The financial institution or creditors shall intimate each Allottee and the Secretary, within 7 (seven) days of affecting the transfer, of the enforcement of the security which has resulted in the

transfer of the ownership of the promoter organization or transfer of the project.

- The new promoter (financial institution or creditors, or a person so appointed) shall apply for necessary updations in existing details. The new promoter shall upload required supporting documents in its name such as land title, building plan approval, etc. The new promoter shall, within 7 (seven) days of completion of transfer, apply for necessary corrections in the existing details, on receipt of approval from Authority. The promoter shall upload a registered undertaking stating compliance with all obligations under agreement to sale executed by the previous promoter with the Allottees.

➲ Vide notice dated 22.07.2021, of Real Estate Regulatory Authority, Bihar (**'Authority'**):

It was decided that:

- The matter of approval of maps in respect of Projects undertaken outside the planning areas is under consideration in the Authority and instructions have been sought from the Government. Till that time registration/extension of registration of such projects has been put on hold.

NCLT Brief:

➲ **ANALYSIS: JAYPEE KENSINGTON BOULEVARD APARTMENTS WELFARE ASSOCIATION AND ORS. VS. NBCC (INDIA) LTD. AND ORS.**

BRIEF BACKGROUND:

The Corporate Insolvency Resolution Process ("**CIRP**") of Jaypee Infratech Limited ("**Corporate Debtor**") was initiated on 09.08.2017 by the National Company Law Tribunal, Allahabad Bench ("**NCLT**") on the admission of an application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**Code**") by IDBI Bank Limited, a financial creditor of the Corporate Debtor.

Subsequently, resolution plans were submitted by NBCC (India) Limited ("**NBCC**") and Suraksha Realty Limited for the Corporate Debtor, and the same were put to vote before the Committee of Creditors ("**CoC**"). Out of the two plans, on 17.12.2019, the Resolution Plan ("**Resolution Plan**") presented by NBCC was duly approved as it secured a voting of 97.36%, and thereafter, it was presented before the NCLT for its approval.

Vide Order dated **03.03.2020**, the NCLT approved the Resolution Plan with some modifications and directions while allowing some of the objections against the Resolution Plan and leaving few propositions open for adjudication before the appropriate forum.

Thereafter, NBCC preferred Company Appeal (AT) (Insolvency) No. 465 of 2020 against the Order dated **03.03.2020** before the National Company Law Appellate Tribunal ("**NCLAT**"). In the said appeal, vide interim Order dated **22.04.2020**, the NCLAT directed that the Resolution Plan may be implemented subject to the outcome of appeal. At the same time, the NCLAT also directed constitution of an 'Interim Monitoring Committee' comprising of NBCC and the three major institutional financial creditors, who were the members of CoC. Against the Order dated **22.04.2020**, appeals were filed before the Hon'ble Supreme Court (**"SC**"). Various appeals pending against the Order dated **03.03.2020** were also withdrawn to the SC from the NCLAT.

PRIMARY ISSUES:

A. What is the extent and limitation of the powers and jurisdiction of the NCLT in dealing with a resolution plan approved by the CoC?

- The SC stated that the decision as to whether a corporate debtor should continue as a going concern or be liquidated is essentially a business decision, which needs to be taken by the CoC. Even to keep the company as a going concern, a resolution plan needs to be approved by at least 2/3rd majority in voting by the CoC after duly exercising their commercial wisdom.

- It was further stated that, the scope of judicial review with regard to approval of a resolution plan is circumscribed by the provisions contained in Section 31 of the Code for the NCLT and in Section 32 & 61 of the Code against the order of approval for the NCLAT.

- The limited judicial review available with the NCLT lies within the four corners of Section 30(2) of the Code which would essentially be to examine that a resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Insolvency and Bankruptcy Board of India ("**Board**"), and it provides for: (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

- Even the power of judicial review under Section 31 of the Code is not akin to the power of a superior authority to deal with the merits of the decision of any inferior or subordinate authority. Further, the jurisdiction of the NCLAT is also circumscribed by the limited grounds of appeal provided in Section 61 of the Code

- Such limitations on judicial review have been duly underscored by the SC in *K. Sashidhar Vs. Indian Overseas Bank & Ors.*[1], *Committee of Creditors of Essar Steel India Limited through Authorised Signatory Vs. Satish Kumar Gupta & Ors.*[2], and *Maharashtra Seamless Limited Vs. Padambhan Venkatesh & Ors*.[3] It has been laid down that the powers of the NCLT in dealing with a resolution plan do not extend to examining the correctness of the resolution plan or the commercial wisdom exercised by the CoC.

- As observed in *Maharashtra Seamless Ltd. (supra)*, there is no scope for the NCLT or the NCLAT to proceed on any equitable perception or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors, i.e., CoC.

- Hence, it was held that, in the adjudicatory process concerning a resolution plan, there is no scope for interference with the commercial aspects of the decision of the CoC, and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the NCLT or the NCLAT, as the case may be, would find any shortcoming in the resolution plan visà-vis the specified parameters, it can only send the resolution plan back to the CoC, for re-submission after satisfying the parameters delineated by Code and exposited by the SC.

B. Whether after approval of a resolution plan by the CoC, where homebuyers as a class assented to the plan, any individual homebuyer or any association of homebuyers can challenge the resolution plan and could be treated as a dissenting financial creditor or an aggrieved person?

- As per Section 30(4) of the Code, for the purpose of approval of a resolution plan, there has to be an approval by a vote of not less than 66% of the voting share of financial creditors in the CoC. As per Explanation to Section 5(8)(f), the debt owed by the corporate debtor towards allottees of the real estate project is considered as a financial debt. However, every individual allottee does not become an independent financial creditor. If the number of allottees are 10 or more, in terms of the meaning assigned to the expression "class of creditors" in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**") then the allottees qualify as financial creditors in a class. Hence, the voting share of that class would be in terms of the financial debt owed to that class as a whole by the corporate debtor.

- Further, as per Section 21(6A)(b), the authorised representative of the class of creditors undertakes the voting on behalf of the class of creditors. As per Section 25A(3A), the authorised representative is required to cast his vote on behalf of all of the financial creditors that he represents 'in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote'.

- The validity of Section 21(6A) and 25A of the Code has already been upheld by the SC in *Pioneer Urban Land and Infrastructure Limited and Ors. Vs. Union of India (UOI) and Ors.*[4]. It was observed that, as the allottees may not be a homogeneous group, there are only two ways in which they can vote on resolutions presented before the CoC, i.e., either approve or disapprove a resolution.

- It has been observed that Sub-section (3A) of 25A of the Code goes a long way in ironing out any creases that may have been felt in the working of Section 25A of the Code as it makes clear that the authorised representative casts his vote on behalf of all of the financial creditors that he represents. If a decision taken by a vote of more than 50% of the voting share of the financial creditors that he represents is that a particular plan be either accepted or rejected, it is clear that the minority of those who vote, and all others, will now be bound by this decision.

- Thus, there is absolutely no scope for any particular person standing within that class to suggest any

[1] AIR2019SC 1329
[2] [2019]153C LA275(SC),
[3] [2020]154C LA280(SC)
[4] AIR2019SC 4055

dissention as regards the vote over the resolution plan. If this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code.

- In light of the above, it was held that, as the homebuyers, being a class, having assented to the resolution plan of the PRA, any individual homebuyer or any association of homebuyers could not challenge the Resolution Plan of the Corporate Debtor, and could not be treated as a dissenting financial creditor or an aggrieved person.

C. Payments to Dissenting Financial Creditors

- A dissenting financial creditor of the Corporate Debtor, ICICI Bank, submitted that it being a dissenting financial creditor, it was entitled to receive payment as per the liquidation value in terms of Section 30(2)(b) of the Code read with Regulation 38(1)(b) of CIRP Regulations. However, the Resolution Plan only provided land and equity in the Special Purpose Vehicles proposed to be incorporated by the Corporate Debtor as per the Resolution Plan. It was contended that the said resolution did not qualify as 'payment' under the said Section and the Regulation thereto.

- The SC observed that the payment as envisaged in Section 30(2)(b) of the Code could only be done in terms of money and the financial creditor who chooses to quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (i.e., by dissenting) cannot be forced to remain attached to the corporate debtor by way of provisions in the nature of equities or securities.

D. Whether contracts entered by a corporate debtor with authorities can be modified and reliefs can be sought through a resolution plan?

- The terms of the Resolution Plan which were effectively modifying the contractual terms of the Concession Agreement dated 07.02.2003 ("**Concession Agreement**") executed between the Corporate Debtor and Yamuna Expressway Industrial Development Authority ("**YEIDA**") were deemed unacceptable by the SC. The Court held that any alterations to the terms of the Concession Agreement would require consent from YEIDA, the concessionaire.

- As per regulation 37 of the CIRP Regulations, the Concession Agreement could not be altered without the approval of the concerned authority, i.e., YEIDA. Regulation 37 of the CIRP Regulations mandates a resolution plan to provide for various measures including 'necessary approvals from the Central and State Governments and other authorities'. It was held that the approval of YEIDA is the sine qua non for validity of the Resolution Plan in question, particularly qua the terms related with YEIDA. The stipulations/assumptions in the Resolution Plan that approval by the NCLT shall dispense with all the requirements of seeking consent from YEIDA for any business transfer are too far beyond the entitlement of NBCC. Neither any so-called deemed approval could be foisted upon the governmental authority like YEIDA, nor an assumption stands in conformity with Regulation 37 of the CIRP Regulations.

- In light if the above, the SC held that the stipulations in the Resolution Plan, as regards dealings with YEIDA and with the terms of Concession Agreement, were rightly not approved by the NCLT, and the stipulations in question, when not being consented to by YEIDA, are required to be disapproved. In cumulative effect of the stipulations which have not been approved by YEIDA, the only correct course for the NCLT was to send the plan back to the CoC for reconsideration.

CONCLUSION:

The SC set aside the Impugned Order dated 22.04.2020 of the NCLAT and partially modified the Order dated 03.03.2020 of the NCLT. Utilising the power under Article 142 of the Constitution of India, the SC also remitted the Resolution Plan to the CoC for its approval, and extended the CIRP of the Corporate Debtor by 45 days. It was also stated that the IRP was open to invite fresh/modified resolution plans from the NBCC and Suraksha Realty Limited.

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